IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (LODG.) NO. 391 OF 2007

M/s. Parag Milk & Milk Products)
Ltd., having their office situated)
at 102, Ramkrishna Niwas, 1st Floor,)
Gokhale Road (North), Dadar (West),)
Mumbai – 400 028. .. .. ..).. Petitioner.

Versus

Union of India,)
Through Director General of Foreign)
Trade, Ministry of Commerce and)
Industry, Department of Commerce,)
New Delhi. .. .. ..).. Respondent.

Mr. K. K. Singhvi, Sr. Advocate with Mr. P.B.Shah for the Petitioner.

Mr. Y. R. Mishra with Ms. H.P.Shah for the Respondent.

CORAM : SWATANTER KUMAR, C.J. &
S.C.DHARMADHIKARI, J.

RESERVED ON : 25TH JUNE, 2007
PRONOUNCED ON: 16TH AUGUST, 2007.

JUDGMENT : (Per SWATANTER KUMAR, C.J.)

Rule. Learned Counsel appearing for the respondent waives service. By consent, Rule made returnable and heard forthwith.

2. The petitioner, a private limited company, is engaged in the business of manufacturing and distributing Milk and other milk products including Skimmed Milk Powder, etc. It has its own manufacturing unit. The petitioner was granted Import Export Code (for short "IEC") No. 3197031814 on 3rd February, 1998 and was also registered with the Agricultural & Processed Food Products Export Development Authority. The petitioner was supplying only liquid milk in the domestic market since 1992 but started exporting Skimmed Milk Product (for short "SMP") since 2004. They expanded the business to the extent that they were accounting for about 12% of the total export of the products. The petitioner had regular dealing with various countries, Dairy Farms in particular, and they entered into agreements with M/s. Unicare International, Bangkok and France International Trade, France, who placed orders with them for supply of SMP on behalf of various buyers interested in purchase of the same by way of import. The petitioner in order to meet international standards as well as proper export so far as Skimmed Milk Products were concerned, made heavy investment in plant and machinery and in fact they obtained loan of Rs.400 lacs from Canara Bank, a Term Loan of Rs.850 lacs, Export Packing Credit of Rs.500 lacs and FDBP / FUBP against Letter of Credit limit of Rs.500 lacs from Union Bank of India and various

accounting facilities. Many other organisations had also invested money in the same fashion. Further, according to the petitioner, as per the prevalent practice, the intending agents open an irrevocable Letter of Credit in their favour and thereafter the petitioner executes the order as per the contract entered into between them and in terms thereof. The Government had surplus supply of milk and the petitioner had also been securing 1.50 lac litres of milk. The State Government, vide its Circular of 29th January, 2007, Exhibit "C" to the petition, had called upon various firms, including the petitioner, to subscribe to their tenders for purchase of milk from them since obviously the Government had surplus supply of milk. The Government of India in its Foreign Trade Policy had introduced various schemes by giving incentives to the exporters of such products and entitling them for duty credit scrip, which is equivalent to 5% of the FOB value of the exports. The Agricultural and Processed Food Products Export Development Authority also granted 1% rebate in the form of transport assistance to all the exporters including the petitioner. On the date of the filing of the petition, the petitioner had three export contracts, which were to be executed and fulfilled by the petitioner, namely,:

(a) An irrevocable standing L/c No. ML07002373 dated 30/01/2007 for USD 580,000/- has been opened by United Global Agencies (Thailand), Exhibit "E" to the Petition, by which the petitioner was required to supply 1000 MT SMP at USD 2900/- p.m.t. For the period from January to May, 2007 at the rate of 200 tons per month.

(b) An Irrevocable standby L/c No. NR14/200700615A/RE dated ½/2007 for USD 1,000,000 has been opened by France International Trade, Exhibit "F" to the petition, by which the petitioner was required to supply 1000 MT each month upto February, 2008.

(c) An irrevocable standby L/c No. 153496/05 amended on 24/1/2007 has been opened by France International trade for USD 1,000,000, Exhibit "G" to the petition.

(d) An irrevocable standby L/c No.D06707011 dated 31/1/2007 has been opened by France International Trade for USD 6,00,000, Exhibit "H" to the petition.

3. As per the existing policies and with the permission to export, the petitioner had various export orders for supply of SMP which remains to be executed as per the agreement entered into with the petitioner and its foreign importers / purchasers within the time limit specified therein. The delay in execution of the work would expose the petitioner to unnecessary liability.

4. The Central Government in exercise of its power under Section 5 of the Foreign Trade (Development & Regulation) Act, 1922 read with para 1.3 and para 2.1 of the Foreign Trade Policy 2004-2009, vide Notification No. 45 (RE-2006)/2004-2009 dated 9th February, 2007,

Exhibit "J" to the petition, imposed a ban on export of SMP, and that too, from retrospective effect till September, 2007 with the result that the petitioner is unable to export their products against their commitments controlled by the above documents. Aggrieved from this Notification, the petitioner, while not really opposing the Notification as far as ban on SMP is concerned, challenged the retrospectivity of the ban and sought permission to fulfill their export commitments to avoid litigation and loss. It may further be noted that during the hearing of this writ petition, vide order dated 16th March, 2007, it was noticed by the Court that the petitioner has a right to approach the Ministry of Commerce in the matter of export of milk powder in order to discharge its existing export obligation which can be examined on a case-by-case basis. And this Court granted liberty and directed the petitioner to approach the Ministry and the Ministry was required to take a decision adhering to the principles of natural justice and disposing of its representation by a speaking order. In furtherance to this Order of the Court, no order was passed by the Ministry which then was again directed vide order of this Court dated 16th April, 2007 to deal with the matter expeditiously which resulted in passing of the order dated 30th April, 2007 issued by the Director General of Foreign Trade, Ministry of Commerce

and Industry, Udyog Bhawan, Delhi, vide which the commitments of the petitioner to export the limited Skimmed Milk Powder was rejected. The petitioner then amended this petition and decided to challenge the policy of the government introduced by the impugned Notification dated 9th February, 2007. It also challenged the legality and correctness of the order dated 30th April, 2007.

5. In the reply filed on behalf of the respondent, it is stated that in terms of the Notification dated 9th February, 2007 the Skimmed Milk and Milk Food for Babies and the items mentioned in the new amendment inserted after Entry No.33 in Table B under Schedule 2 of ITC (HS) are not permitted to be exported with immediate effect as the same is made in public interest. The amendment has been directed under the powers conferred upon the Government under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992. In regard to retrospective operation, it is submitted that once there is a ban, on any pretext the export of these products cannot be permitted as it would violate the foreign policy. It is stated that the Government must be given adequate flexibility to take decision and to implement the same. A meeting of the Committee of Secretaries was held on 19th December, 2006

to review the prices of commodities, including milk, and the steps taken by the concerned Department. The matter was also discussed in another meeting and finally it was decided that in order to improve the domestic milk availability there would be a need to restrict export of milk powders for some time in future. This was approved by the Cabinet Committee and finally vide a Notification dated 9th February, 2007 the ban was imposed. In the meeting of the Cabinet Committee on Economic Affairs held on 1st February, 2007 where the Department's letter dated 22nd January, 2007 was considered, the proposal was approved as under:

> "Ban on export of milk powder till 30th September, 2007 which will cover most part of the lean season with the direction that any issue regarding the discharge of existing export obligation be examined on a case-by-case basis."

6. At the very commencement of discussion on the merits of the case, we must notice that in paragraph 11 of the reply affidavit filed on behalf of the respondent it is stated as under:

> "I would like to further add that there is no retrospective restriction in the notification since the Union Finance Minister has made the decision public on 9.02.2007 itself. Therefore, the statement concerning retrospective operation does not apply to the facts of the case. Moreover, the public interest as noted by the Cabinet Committee justifies the issuance of this Notification."

We have already noted that the petitioner is not challenging the validity or the correctness of the Notification dated 9th February, 2007 in its entirety and for all other purposes has accepted the same. Thus the limited controversy which needs to be examined by the Court is whether or not the order dated 30th April, 2007 passed by the Respondent in so far as its denial part to the petitioner to fulfill its existing contractual obligation calls for any interference.

7. Learned Counsel appearing for the petitioner contended that the respondent has acted arbitrarily in denying the relief to the petitioner, when heavy investments have been made by the petitioner and the export contracts were to be operative for the period of 2004 to 2009. The petitioner's commitment under the three letter of intent is limited one for which it had already made arrangement for supply of Skimmed Milk Products to the foreign buyer. There is no dispute as to the execution and the responsibility of the petitioner as in the reply affidavit filed on behalf of the respondent it is clearly stated that the Letters of Credit show validity till January, 2008 and, February, 2008 and therefore the petitioner could co-operate with the Government as the ban was in public interest. Some

period has obviously lapsed during the pendency of the writ petition and the delay in Court cannot be construed to the disadvantage of any party. The letters of credit opened in favour of the petitioner by its foreign buyers were dated 24th January, 2007 and 30th February, 2007 and which were even amended. The supplies were to be effected at the rate of 200 tonnes per month. It was argued on behalf of the petitioner that the action of the respondent in denying the requisite relief to the petitioner was arbitrary and was not substantiated by any plausible reasoning. In fact the order dated 30th April, 2007 is hit by the principles of retrospectivity. In support of this contention, learned Counsel for the petitioner relied upon the judgment of the Supreme Court in the case of ***Union of India v/s M/s. Asian Food Industries,*** passed in Writ Petition (civil) No. 4695 of 2006 decided on 7th November, 2006 for the following :

> "We, however, need not dilate on the said question as in the case of Agri Trade India Services (P) Ltd., the requirements of Section 51 of the 1962 Act had not been complied with whereas in the case of Asian Foods Industries, it was done.
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> The Delhi High Court, however, in our view correctly opined that the notification dated 4th July, 2006 could not have been taken into consideration on the basis of the purported publicity made in the proposed change in the export policy in electronic or print media. Prohibition promulgated by a statutory order in terms of Section 5 read with the relevant provisions of the policy decision in the

> light of Sub-section(2) of Section 3 of the 1992 Act can only have a prospective effect. By reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot a fortiori be taken away by an amendment thereof.
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> In construing such a prohibitory order, whereas the rule of strict construction must be followed, the interpretation which subserves the intention of the Central Government as laid down in the policy as well as in the procedure should be given effect to. A statute as is well known may have to be construed in the light of the subordinate legislations framed thereunder. When subordinate legislation has been framed by the same authority which exercises the power under the policy, the intention of such policy maker must be found out from the words used therein albeit having regard to the rights of the exporters which are sought to be protected thereby.
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> We, therefore, are of the opinion that whereas the judgement of the Gujarat High court must be upheld, that of the Delhi High Court, albeit for different reasons, cannot be sustained."

Reliance is also placed on the judgment of the Supreme Court in ***Mahabir Vegetable Oils (P) Ltd. And another v/s State of Haryana and others,*** (2006) 3 Supreme Court Cases 620, where the Court clearly enunciated the principles that there could be retrospective effect of the amendment by way of legislation, but distinction had to be drawn between vested rights and accrued rights as by reason of a delegated legislation, a right cannot be taken away retrospectively. On the other hand, according to the respondent, it was the decision taken in larger

public interest and to satisfy the domestic need. It was a policy decision and where there are policy decisions the Court should not interfere as stated in the case of ***Federation of Railway Officers Association & Others v/s Union of India,*** (2003) 4 Supreme Court Cases 289, where the Supreme Court stated that the scope of judicial review in matter affecting policy and requiring technical expertise would be very limited and the Court may not interfere in such decisions. It is also contended on behalf of the respondent while relying upon the judgement of the Supreme Court in ***Kasinka Trading v/s Union of India,*** 1994(74) Excise Law Times 782 (S.C.), and ***Darshan Oils Pvt. Ltd. V/s Union of India,*** 1995 (75) Excise Law Times 32 (S.C.), that the power to revoke includes the power to modify and amend. Even a time bound assurance could be modified or revoked at any time in public interest and the doctrine of promissory estoppel would not be attracted. The Government is also at liberty to review its policy keeping in view the larger public interest. The doctrine of legitimate expectancy plays no role when the authority is empowered to take policy decision and burden would be on the petitioner to satisfy the Court that the same would be an abuse of power.

8. In the present case it cannot be disputed that when the Letters of Intent were issued in favour of the petitioner the declared policy of the Government did not impose any ban upon export of SMP and its alike products. The right by virtue of the contract between the exporter and importer should settle for them. The expression "export obligation" as defined in the Foreign Trade Policy has to be given a cogent meaning on its plain interpretation. It will not be permissible to attach an unnecessary restricted meaning to this expression. In the impugned order dated 30th April, 2007 it has been noticed by the Authority that export obligation means obligation to export product or products gathered by authorisation or permission in terms of the quantity, value or both as may be prescribed or specified by the regional or competent authority. This has been understood by the authority that the contractual obligation against some Letter of Credit would not fall in this category. We are unable to accept this reasoning of the authority in as much as once there was no ban or restriction on export of SMP no permission from any authority would have been required. It falls within the ambit of free sale and the necessary documents for shipping or export of SMP and other milk products would only be by virtue of contract / export document and nothing more. In the entire order it has

not been stated as to which document the petitioner has failed to produce or which the Authority expected it to produce. There are concluded contracts between the parties and in fact part of them was implemented as well. Another reason stated by the petitioner was that Skimmed Milk Products is a product taken out of normal milk and/or the normal milk products and there was no ban on export of such items. As such a ban was not justified and in any case would not be made effective retrospectively. May be the Court would not go into such question primarily for the reason that the demand of skimmed milk and its products may be high in domestic market and authorities concerned may have taken decision to ban such export retrospectively but to unsettle the settled rights or concluded rights of the parties would hardly be permissible in the garb of such notification. The decision of the authority does not appear to be in conformity with the settled canons of law.

9. The notification and the decision of the Cabinet Committee meeting on 1st February, 2007 clearly gives power to the authority to examine on case-by-case basis and permit discharge of their existing export obligation. The authorities concerned in their wisdom retained unto themselves the power to permit such export. Thus it was not the intent of the authority to

operate the absolute ban even in relation to existing liability. Once it chose to reserve such powers, obviously, then the powers have to be exercised judiciously and fairly. Even the order of the Division Bench of this Court dated 16th March, 2007 indicates that the Ministry of Commerce was expected to consider the representation of the petitioner in the light of the observations made in its order. To decide policies and take actions is in executive domain of the Government but these are expected to be in conformity with law and not arbitrary or ultra vires. The policies of the Government may not be static as they change in terms of need based upon the decision of the authority. Judicial review of the policy matters per se would not fall within the limitation of judicial review but once it is tainted with unfairness or arbitrariness the Court would have to examine the pros and cons of such decision. Even where there is a change in Government policy as a result of change in the Government, the decision bringing out a change in execution of the policy may not be questionable and court may not embark upon any judicial review unless such a decision was contrary to law, malafide and offended public policy. The Supreme Court in a recent judgment in the case of ***MRF Limited, Kottayam v/s Assistant Commissioner (Assessment) Sales***

Tax and others, (2006) 8 Supreme Court Cases 702, the Court held as under:

> "35. Besides, a plea of promissory estoppel is in the nature of an equitable plea and must be determined in the facts and circumstances of each case where it is raised. In *Rom Industries* the deciding factor was that the exemption notification in question had been itself held to be unconstitutional in an earlier case as violative of Articles 301 and 304 of the Constitution of India and, therefore, could not form the basis of any right. The observation made in para 8 of that judgment has to be read in that context. Besides, the State Government in that case had no option except to withdraw the notification. It is so observed in that judgment in para 9: (SCC p.352)
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> > "The State Government, in view of the decision of this Court had no other option but to place edible oils in the negative List. The questions whether *Shree Mahavir Oil Mills* has been rightly decided or not and whether it is in conflict with the principles enunciated in *Video Electronics* are moot. But while the decision stands, the State Government is bound to comply with it."
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> 36. In *Kasinka Trading case* the notification in question was a customs exemption notification for a fixed period. The judgments in *Pournami Oil Mills case* and *Shri Bakul Oil Industries case* were distinguished in the said case on the ground that the notifications in those cases were incentive notifications. It was observed in para 27: (SCC p.291)
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> > "Again in *Bakul Oil Industries* it was the incentive to set up industries in a conforming area that the exemption had been grant ed and the *Court held that the Government could withdraw an exemption granted by it earlier only if such withdrawal could be made without offending the rule of promissory estoppel and without depriving an industry entitled to claim*

exemption for the entire specified period for which exemption had been promised to it at the time of giving incentive. Both these cases therefore cannot advance the case of the appellant and are distinguishable on facts because the exemption notification under Section 25 of the Act which was issued in this case did not hold out any incentive for setting up of any industry to use PVC resins and on the other hand had been issued in exercise of the statutory powers, in public interest and subsequently withdrawn in exercise of the same powers again in public interest. In our opinion, no justifiable prejudice was caused to the appellants in the absence of any unequivocal promise by the Government not to act and review its policy even if the necessity warranted and the `public interest' so demanded. *Thus, in the facts and circumstances of these cases, the appellants cannot invoke the doctrine of promissory estoppel to question the withdrawal notification issued under Section 25 of the Act."*

37. The decision in *Kasinka Trading* has been distinguished in the later decision by this Court in *State of Punjab v. Nestle India Ltd.* On the ground of the inherent nature of an exemption notification issued under Section 25 of the customs Act. Even in respect of a notification under Section 25 of the Customs Act this Court has taken the view that the withdrawal even of such a notification must not be "arbitrary" or "unreasonable" (see *Dai-Ichi Karkaria Ltd. v. Union of India).*

38. The principle underlying legitimate expectation which is based on Article 14 and the rule of fairness has been restated by this Court in *Bannari Amman Sugars Ltd. vs. CTO.* It was observed in paras 8 and 9: (SCC pp633-34)

> "8. A person may have a `legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a

representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. It is generally agreed that `legitimate expectation' gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expecation is not fulfilled by taking a particular decision then the decision-maker should justify the denial of such expectation by showing some overriding public interest. (see *Union of India v. Hindustan Development Corporation).*

9. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet.

> The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat for fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. *The meaning and true import and concept of arbitrariness is more easily visualised than precisely decided. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action an if so, does it really satisfy the test of reasonableness.")emphasis supplied)*

39. MRF made a huge investment in the State of Kerala under a promise held to it that it would be granted exemption from payment of sales tax for a period of seven years. It was granted the eligibility certificate. The exemption order had also been passed. It is not open to or permissible for the State Government to seek to deprive MRF of the benefit of tax exemption in respect of its substantial investment in expansion in respect of compound rubber when the State Government had enjoyed the benefit from the investment made by MRF in the form of industrial development in the State, contribution to labour and employment and also a huge benefit to the State exchequer in the form of the State's share i.e. 40% of the Central excise duty paid on compound rubber of Rs.177 crores within the State of Kerala. The impugned action on the part of the State Government is highly unfair, unreasonable, arbitrary and, therefore, the same is violative of Article 14 of the Constitution of India. The action of the State cannot be permitted to operate if it is arbitrary or unreasonable. This Court in E.P.Royappa *v. State of T.N.* observed that where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Equity that arises in favour of a party as a result of a representation made by the State is

> founded on the basic concept a "justice and fair play". The attempt to take away the said benefit of exemption with effect from 15-1-1998 and thereby deprive MRF of the benefit of exemption for more than 5 years out of a total period of 7 years, in our opinion, is highly arbitrary, unjust and unreasonable and deserves to be quashed. In any event the State Government has no power to make a retrospective amendment to SRO No.1729/93 affecting the rights already accrued to MRF thereunder.
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> 44. We do not agree with the submission made by the learned counsel for the respondent State that the subsequent notification was classificatory in nature. That it only removed the doubt which had arisen with reference to "compound rubber" in SRO No.1729/93. Making of "compound rubber" had been accepted to be "manufacture" in the memorandum of understanding entered into between MRF and the Government on 6-10-1993 and the addendum dated 10-4-1996 to the memorandum of understanding dated 6-10-1993. It is further recognised in the eligibility certificate issued by the Director of Industries and Commerce after investigation and due verification and the exemption certificate issued by the Board of Revenue.
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> 45. For the reasons stated above, the appeal is accepted, the order of the High Court is set aside. A writ of mandamus is issued, restraining the respondents from taking any proceedings against MRF Ltd. Contrary to or inconsistent with the eligibility certificate dated 10-11-1997 and the exemption order dated 30-6-1998. Parties shall bear their own costs."

10. The above principles, if applied to the present case, would show that the doctrine of legitimate expectancy, and for limited extent of constructive promissory estoppel, would have some application. The petitioner has invested huge amount to establish a plant

and export facilities of international standards. The declared policy was to operate during the period of 2004 to 2009. Prospective application of the ban is not in question before us. On various grounds the same could even be justified. However,if the concluded contracts, which have been acted upon between the parties partially prior to the cut off date are not fulfilled, it would, to a great extent, amount to disturbing the settled things. Such an approach would be greatly unacceptable in view of the fact that the respondent themselves had reserved the right to examine on case-to-case basis the existing export obligations. Nowhere in the order, and for that matter even in the counter affidavit, it is stated what would be the existing export obligation and under what circumstances the benefit of the decision could be given to the affected parties. Public interest is a term of wide connotation and it has to be considered keeping in view the facts and circumstances of each case. The Authorities concerned while passing the order dated 30th April, 2007 had ignored these aspects of the matter while it has taken into consideration what is not on record. There is nothing even on the court file to show as to what is intended by existing export obligation, simplicitly except obligation in relation to free trade items. We may also notice that on 20th April, 2007 some discussion had taken

place between the Director General of Foreign Trade, Ministry of Commerce and the petitioner. Vide their letter of the same date they had stated that as per the discussions the petitioner may be allowed to export 5000 M.T. Skimmed Milk Powder against existing contractual obligations. Thus the petitioner was even willing to restrict its trade to export of 5000 M.T. The impugned order does not even touch this aspect of the matter in its proper perspective.

11. We have already noted that it is not even the case of the respondent that the Notification dated 9th February, 2007 is to have a retrospective effect in its strict sense and still they are not permitting the export of the goods as is done in the present case.

12. For the reasons aforestated, we quash and set aside the order dated 30th April, 2007 passed by the Director General of Foreign Trade, Ministry of Commerce and Industry, Udyog Bhawan, Delhi, and direct the said Authority to hear the petitioner and pass appropriate order afresh in accordance with law and keeping in view the decision of the Court as aforereferred within four weeks from today.

13. Rule is made absolute in terms aforesaid. This Writ Petition is, accordingly, disposed of. However, parties are left to bear their own costs.

Sd/-

CHIEF JUSTICE

Sd/-

S.C.DHARMADHIKARI, J.